



MINUTES OF THE GREENSBORO BOARD OF ADJUSTMENT February 22, 2010

A regular meeting of the Greensboro Board of Adjustment was held on Monday, February 22, 2010 at 5:30 PM in the City Council Chamber of the Melvin Municipal Office Building. Board members present were: Rick Pinto, Chair, Scott Brewington, Clinton Turner, Cheryl Huffman, Brian Pearce, Bill Strickland, Ryan Shell, and Russ Parmele. Staff present were: Rawls Howard, Zoning Administrator, Chris Marland as well as Jim Clark, City Attorney's Office.

Chair Pinto called the meeting to order and explained the policies and procedures of the Board of Adjustment. He further explained the manner in which the Board conducts its hearings and the method of appealing any ruling made by the Board. The Chair advised that each side, regardless of the number of speakers, would be allowed a total of 20 minutes to present evidence.

APPROVAL OF MINUTES

Mr. Turner stated that he voted in favor of the motion on page 3, not against.

Ms. Huffman moved to approve the minutes of the January 25, 2010 meeting as amended, seconded by Mr. Brewington. The Board voted unanimously in favor of the motion.

SWEARING IN OF STAFF

Rawls Howard and Chris Marland were sworn in for their testimony related to matters listed on the agenda.

CONTINUANCES/WITHDRAWALS

No one appearing before the Board asked to be granted a continuance.

NEW BUSINESS

VARIANCE

- (a) BOA-10-02: **2422 RETRIEVER LANE** Robert and Lois Losyk request a variance from a rear setback requirement. *Violation:* A portion of a proposed attached screened porch will encroach 4 feet into a minimum 15-foot rear setback. Table 30-4-6-1 and Section 30-4-6-1(D)(2)(b), Present Zoning- RS-12(CL), BS-230, Cross Street-Lake Brandt Road. **(GRANTED)**

Rawls Howard stated the property is located in Howards Walk Subdivision at the north end of the cul-de-sac on Retriever Lane west of Lake Brandt Road on zoning map block sheet 230. The applicant is proposing to cover an existing patio with a screened porch. The patio is

located at the rear of the existing house. A portion of the addition will encroach 4 feet into a 15-foot rear setback.

The proposed dimensions for the screened porch are 19 feet by 12.5 feet for a total area of approximately 273 square feet. The property is currently zoned RS-12(CL) (Residential Single Family with Cluster Zoning Development option). The property was eligible to develop using cluster zoning requirements. The lot size and setbacks were reduced to the RS-7 zoning district requirements. The objective of cluster development is to place houses closer together on smaller lots than normally permitted in the zoning district and to place land which would otherwise have been included in private lots into public dedication or common elements for open space. The current rear setback requirement for RS-7 is 20 feet; however, Section 30-4-6-1(D)(2)(b) states: "Rear setbacks may be reduced to fifteen (15) feet if rear property lines abut public drainageway and open space areas or if rear property lines abut common elements open spaces at least thirty (30) feet in width." The rear of this lot abuts common elements that exceed thirty 30 feet in width; thus the applicant's required rear setback may be reduced to 15 feet. The applicant also has other common elements area contiguous to his property. The common elements area is located east of the applicant's lot and contains a permanent watershed wet detention pond.

Chair Pinto asked for anyone wishing to speak in favor of the request.

Robert Losyk, 2422 Retriever Lane, presented photographs of the property and letters from neighbors to the Board. He stated that if they were to comply with the strict letter of the ordinance they would have practical difficulties and unnecessary hardship. They can make no reasonable use of the patio eight months out of the year due to the proximity of the ponds. The incredible amount of mosquitoes, gnats, and the geese that travel between the two ponds make the area unusable. He stated the geese defecate on the open patio and steps. He has had to repaint the patio from the many cleanings it requires. He has contacted the City about mosquito abatement, but they cannot provide such services, nor can they do anything about the geese. The only way to alleviate the difficulty and unnecessary hardship is to screen in the existing patio.

The patio already exists, and the footprint has been there since the construction of the home. The patio is at an angle. As a result of the angle the patio encroaches in the setback at one end, for less than four feet. The other end is within the setback. He calculated that the construction would be 94%-96% out of the setback. Only about 4%-6% would be encroaching into the setback.

The hardship is a direct result of the application of the ordinance to the property. If granted it would preserve the spirit of the ordinance, and they would have reasonable use of the property. The public safety and welfare would be assured. The neighbors adjacent to the property would not be able to see the screened in patio due to the location of the property. There are no neighbors behind them.

Chair Pinto asked if the letters were from the neighbors on either side of the property. Mr. Losyk stated that they are from the two closest neighbors. A pond is on one side of his property.

Chair Pinto asked if the applicant would limit the size of the screening to the footprint of the existing patio. Mr. Losyk stated that he would.

Chair Pinto asked how high off the ground the patio is. Mr. Losyk stated that the patio is approximately 1 to 2 feet off the ground on one end, and approximately 3 to 4 foot at the other end.

No one spoke in opposition to the request.

Ms. Huffman stated that since the footprint of the patio already exists then there is no further encroachment. Also the encroachment is only on one end of the patio.

Chair Pinto stated that the cluster developments already have decreased setbacks. He also stated that the Board would have to decide if no reasonable use could be made.

Mr. Brewington stated that the pond is causing issues, and this is not the first time these issues have come before the Board. Mr. Turner asked staff if there has been a similar case in the neighborhood. Mr. Howard stated that the previous case was in another area close by, but it was denied, appealed, and the appeal was denied.

Mr. Brewington stated that screening the porch in if it is a number of feet off the ground could make the area safer as well.

Mr. Parmele moved that the zoning enforcement officer, in the case of BOA-10-02, be overruled and the variance granted based upon the following: There are practical difficulties or unnecessary hardships that result from carrying out the strict letter of this ordinance. If the applicant complies with the provisions of the ordinance, they can make no reasonable use of the property because the property is located in a cluster zoning development which restricts the setbacks of the property and the challenge with respect to mosquitoes, geese, and the proximity to the ponds makes the current patio virtually unusable. The hardship of which the applicant complains results from unique circumstances related to the property because of the close proximity to the ponds directly adjacent to the property. This impacts the quality of life and the usefulness of the patio. The hardship results from the application of this ordinance to the property because it does not allow the applicant to cover the patio, and make reasonable use of it. The hardship is not the result of the applicant's own action as the ordinance is written and the current location of the house with respect to the ponds. The variance is in harmony with the general purpose and intent of this ordinance and preserves its spirit because by making this modification it will allow the homeowner to better utilize the patio and the property, and does not detract from the neighborhood. The granting of the variance insures the public safety and welfare and does substantial justice because there will be no harm to the neighbors, the geese will not be interrupted in their annual migrations, the homeowner will be able to use the property more fully, and architecturally it does not impact the surrounding properties. Mr. Turner seconded the motion. Chair Pinto stated that the Board took into evidence two affidavits from neighbors showing no opposition to the request, as well as a number of photographs that clarify some of the testimony. The Board voted unanimously, 7-0, in favor of the motion. (Ayes: Pinto, Turner, Brewington, Shell, Parmele, Huffman, Strickland. Nays: None.)

APPEAL OF NOTICE OF VIOLATION

- (b) BOA-10-03: **2511 FONTAINE ROAD** Oxford House Inc. appeals a Notice of Violation in reference to the use of the property for more than four (4) unrelated individuals living together. Section 30-2-2.7, Present Zoning-RS-9, BS-72, Cross Street-Cheltenham Boulevard.

Mr. Howard stated the zoning office received a complaint on December 9, 2009 that there is a family care located at the referenced address, and that the home location did not meet the ¼ mile spacing requirement. Enforcement staff conducted an inspection and found multiple people living in the house. The residents told the officer they were a half-way house. The field officer issued a Notice of Violation in reference to Section 30-5-2.37 for a family care home which did not meet the spacing requirement. On or around December 28, 2009, the zoning office received a letter from the applicant's attorney that references the use of the property, related issues, and Oxford House guidelines information. After discussion with the staff, it was determined that they did not meet the City's definition of a family care home as the house had no administrative or supervisory personnel. The attorney informed staff that there were 8 or more unrelated persons living in the house. Staff then informed the attorney that despite not being a family care home, they were, in fact, in violation of the City's definition of a family by having that many unrelated people in a structure in a residential district. As such, they would be issued a Notice of Violation for this infraction and the previous one would be rescinded. On January 5, 2010, the City issued a different Notice of Violation in reference to Section 30-2-2.7 which references the definition of family. On or around Jan 14, 2010, the City Attorney's Office received a letter from the applicant's attorney which acknowledged the Notice of Violation, along with his disagreement over how the City was applying its family definition, and intent for due process. On January 20, 2010 the applicant's attorney filed their appeal of the January 5, 2010 Notice of Violation.

Mr. Howard stated that when talking with the attorney for the appellant he stated there were three options available for recourse. He informed the attorney that a text amendment, rezoning, and an appeal of the notice of violation were all options for this matter.

Mr. Turner asked where the other family care home was that was closer than ¼ mile. Mr. Howard stated he could get that information for him, but the violation does not deal with the family care home ordinance.

Mr. Shell asked what the appellant would have sought from a text amendment. Mr. Howard stated that would change the City's definition of 'family'.

Chair pinto asked for anyone wishing to speak in favor of the appeal.

Greg Hefner, 1510 Twisted Oak Dr. Chapel Hill, NC, asked if the zoning officer that issued the citation will be available for cross examination. Mr. Howard stated that he was not in attendance. He stated that the City has not classified the home as a family care home; rather they have classified the home to be more than a single family. The issue is the limitation of a maximum of 4 unrelated people. His client would like to remain having seven residents with the possibility of an eighth.

Chair Pinto asked if it was the appellant's position that the statute has been misconstrued, or are they here to argue for a change in the ordinance. Mr. Hefner stated that he is not arguing that the definition was misapplied, but the federal law requires the city to make an accommodation to these particular residence. It is on this basis that the residents should have been classified as a family or exempted them from the limitation of the ordinance.

Chair Pinto stated that the authority of the Board is to ascertain if application of the ordinance was reasonable, not whether the application of the ordinance violates federal law. He stated the Board was more than willing to hear what the appellant had to say, but the Board could only determine if the ordinance was enforced reasonably. The appellant would then have to appeal the decision of the Board to the Superior Court.

Mr. Hefner stated that it was not his position at this point that any federal law had been violated. His contention is that federal law requires or allows the City to grant a reasonable accommodation for these residents. Until the City denies these accommodations no violation of the Fair Housing Act has occurred. Once violated, the appellant would file an action in federal court. The reason they filled this appeal, as opposed to the other two options, is because he did not understand how a rezoning would accommodate the definition of family and the text amendment might set a precedent the City is uncomfortable with. He felt this was the only option that granted specific relief without creating a precedent.

Mr. Pinto asked Jim Clark, City Attorney's Office, if the Board had the authority to grant exceptions in this case. Mr. Clark stated that the Board has an interpretive power, but it is limited. The limits would need to be set by the Board. In general he agrees with the comments by the Chair. But he can not tell the Board that the interpretation that Mr. Hefner stated whether the Board has the to make that as an interpretation as an accommodation as being reasonable interpretation of a zoning officials administration in light of other existing law, might be a reasonable course of action. He can say that the letter of what the Board is required to do is in line with the Chair's comments.

Chair Pinto asked if the Board could ultimately decide that the ordinance was interpreted properly by staff, i.e. this does not come under the definition of a 'family' and the notice of violation was appropriate, but in our discretion we think the City ought to provide a reasonable accommodation for this situation, therefore the Board overrules the violation. Mr. Clark read from the ordinance "in interpreting the code on appeal the Board has all the authority of the enforcement officer, and may, if it reads provisions of the code differently from the officer, reverse or modify the officer's decision". That is an interpretation strictly of the code. From the ordinance: "This power may be exercised only when the Board believes that the officer misread the code or acted without authority". Mr. Clark stated that it is hard to believe, given the evidence, that the officer misread the code. The question becomes, 'Did the officer act without authority?'. We know what the authority is that exists within the code of ordinances. But is superseding federal law, FHA Amendments of 1988, and applying that in their daily duties part of their job?

In terms of what this Board is capable of doing, the Board is the arbiter as to the fullest extent of the Board's power. In determining whether or not the zoning officer read the code properly, that is not really up for debate. The question becomes whether or not the zoning officer acted without authority, in light of 1) the code of ordinances or 2) the code

of ordinances as applied in relation to other federal law. Mr. Clark believes that is only in light of the code of ordinances. That has been how the Board has approached this in the past. He can not tell the Board that if they decide to broaden their authority slightly it would be wrong. That is solely to the Board's discretion.

Mr. Clark stated that with regard to the other two options that were discussed with the appellant, granting an accommodation in this case is not something the Legal Department is authorized to do. This should be an action by a governing body of the City. But no one can say what the outcome of any other City governing body might be with regard to the other alternatives of rezoning and text amendment.

Mr. Hefner asked if the Board believes it can apply or grant a reasonable accommodation under the Federal Fair Housing Act. He stated that his client would prefer to work this out without a legal remedy.

Chair Pinto stated that this exact issue has not come before the Board, and they can talk as a Board as to whether they think they can grant an accommodation based on the federal law. Chair Pinto stated that they could also table the item to allow the appellant to try the other means to a resolution.

Mr. Clark stated if the client consents, it may be wiser for the Board to take this matter under advisement and continue the matter, as it stands, and to take its initial consideration under advisement. That may open an avenue towards one of the other options.

Mr. Howard stated that there are still some considerations, given that the house is built for a single family structure. If they get a rezoning for multi-family they would have to have more than one unit, and there may be construction cost issues. There are other considerations to consider for the rezoning option. He is willing to talk with the appellant more about the other options.

Ms. Huffman asked if the text amendment would be a rewriting for the one property. Mr. Howard stated that it would affect the entire city. She asked if rezoning would require money, time, and construction. Mr. Howard said that it could, but he would have to review the code and options.

Mr. Brewington stated that an expansion of authority would be necessary. If the Board was to uphold the enforcement officer, and the appellant appealed to Superior Court, it seems the Board would get more feedback relative to the Board's authority. Mr. Brewington expressed a concern that ruling in the matter would set a precedent. He feels expanding the Board's authority makes things different.

Chair Pinto stated that because Mr. Hefner is going to base his comments federal, and the law of accommodation, the Board could enter area where they must decide if, at the local level, is it the responsibility of the enforcement officer to understand federal implications of accommodation. At the city level, one might argue, that four unrelated people is an accommodation. A line must be drawn. If we are to rule based on that concept it maybe worthwhile to move it up to the State Court level for clarification.

Chair Pinto stated that the residents are still at the residence, and would remain there until some Board makes a decision. Mr. Hefner stated that he would entertain the option of tabling the matter to some future date to explore other options. Chair Pinto asked if a sixty day continuance would be appropriate. Mr. Howard stated that the process could take longer than that. Mr. Clark suggested that the Board could just table the matter for an indeterminate amount of time under Robert's Rules. Mr. Hefner agreed to the option to table the item.

Mr. Parmele asked that if and when the appellant did come back they discuss Oxford House in general; the how and what of the program.

Ms. Huffman stated that through her research she saw no maximum number of residents for the homes. Mr. Hefner stated that if he were to go forward, 90% of what would be presented would be information on how Oxford House operates. He presented the Oxford House manual to the Board as evidence. The appellant, Kathleen Gibson-Meyers, stated that the average number of residents is about 10-12.

Ms. Huffman asked Mr. Hefner if there was North Carolina case law regarding Oxford House specifically. Mr. Hefner stated that there was only federal case law. Mr. Clark stated that there were no State Court matters.

Chair Pinto moved with regard to case BOA-10-03, appeal of a notice of violation, to table the matter for 90 days until the May regular meeting, with the consent of the appealing party through its attorney Mr. Hefner, seconded by Mr. Parmele. The Board voted unanimously, 7-0, in favor of the motion. (Ayes: Pinto, Turner, Brewington, Shell, Parmele, Huffman, Strickland. Nays: None.)

OTHER BUSINESS

Discussion on possible amendment concerning changing voting requirements:

Mr. Howard stated during a legal review with outside counsel it was suggested that the voting requirement procedures may need to be amended. The culture at BOA has always been four votes. In the ordinance it states that to grant a variance, special exception, interpretation, etc. there must be four votes. In the opinion of outside counsel this is in conflict with the special State legislative language that grants the power for those votes. In the opinion of the outside counsel the Charter is out of date and needs to be updated. The interpretation is that the four votes only count when the Board is going to reverse or modify any order, requirement, decision, determination, or interpretation of an administrative officer charged with enforcing the ordinance. In his opinion, the issue is that the votes only count when some one is trying to appeal the zoning enforcement officer's interpretation, not for variances, special exceptions, or any of the other things that are granted. The new LDO is revised to reflect that interpretation, and any action by the Board on any case can be decided with four votes. Mr. Howard stated he feels the matter is still interpretive; the language just needs to be cleaned up.

Chair Pinto asked if it would be clarified in the LDO so that it remains as it has been interpreted in the past. Mr. Howard said that it would.

Mr. Clark stated that the application of State law, with regard to the City Charter, has the requirement of deciding every case with a 4/5 majority, except appeals of zoning enforcement officer interpretations. That has not how the City legal department has interpreted this in the past. Until this material is changed, the City will continue to use the four votes rule.

The Board indicated support for the four votes policy.

Discussion

Mr. Turner asked what to expect during tomorrow's seminar. Mr. Howard did not have any details on the seminar's agenda. The seminar will be held at the Coliseum, with registration starting at 1:00 PM.

Ms. Huffman stated concern about the fact that the Oxford House did not have a limit on the maximum number of residents. Mr. Howard stated that the amount of units required can help regulate that issue. Building inspections and safety will also have a role. Staff would probably scrutinize, and not recommend rezoning to multifamily in the middle of a single family area.

Mr. Howard stated that he has heard from a lot of neighbors through emails and other correspondence that they are livid about what is going on there right now. As staff he is still giving them all options that might be available to resolve the violation.

Ms. Huffman stated she feels it might have been better to go ahead and decide the case. Chair Pinto stated that if Mr. Howard finds, in working with the appellant, that they need to come back to the Board they do not need to wait the entire 90 days. If he wants to take 90 days he can, but the Board would welcome the hearing earlier if desired by the appellant.

A Board member asked what the neighbor complaints were. Mr. Howard stated the observations they are getting from the neighbors is traffic, nonresidents coming in and out at all times of the night, the residents are all women, and a lot of men are showing up, fights, and other issues. Mr. Shell asked if there were any police reports for the residence. Mr. Howard stated that he would find out, but he would not doubt if there were some police reports.

Mr. Clark cautioned the Board, stating there was quorum present, and the matter of the case is closed. All of the discussion can only be considered discussion, and can not be considered in any future action.

ACKNOWLEDGEMENT OF ABSENCES:

The absence of Ms. Trexler was acknowledged.

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ADJOURN:

There being no further business before the Board, the meeting adjourned at 7:09 PM.

Respectfully submitted,

Rick Pinto, Chair
Greensboro Board of Adjustment

RP/jd